



July 10, 2001

Ms. Amanda Crawford
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

OR2001-2947

Dear Ms. Crawford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148708.

The Office of the Attorney General (the "OAG") received a request for information or documents regarding "investigations, prosecutions, civil actions, task forces, cooperative efforts and/or other matters related to the so-called 'Republic of Texas' group or movement and/or related to individuals or groups or movements involved in similar or interconnected activities of a potentially illegal or disruptive nature in Texas or elsewhere during the period 1990-2001." Initially, the requestor agreed to limit the request to information that the OAG did not consider privileged or confidential. While inspecting the released documents, the requestor rescinded the agreement and renewed his request for all responsive information as well as information relating to the Dominion of Melchizedek, Harris County, and twelve specified individuals.

You state that you have made responsive information available to the requestor. You have also withdrawn your request for a decision for the information in Exhibit 7 and state that you will release this information to the requestor. You claim that the remaining requested information is excepted under sections 552.101, 552.107, 552.108, 552.111, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information and the representative samples of information.¹

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You contends that Exhibits 1-6 are excepted under section 552.108 of the Government Code. Section 552.108 of the Government Code provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a), (b). Section 552.108 applies to information held by a law enforcement agency or prosecutor. Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978). However, if an administrative agency's investigation reveals possible criminal conduct that the agency intends to report or has already reported to the appropriate law enforcement agency, section 552.108 will apply to information gathered by the administrative agency if its release would interfere with law enforcement. *See* Open Records Decision No. 493 at 2 (1988).

You explain that the OAG formed a task force to look into the activities of the so-called Republic of Texas and to cooperate and assist local, state, and federal law enforcement agencies in carrying out their duties and dealing with members of the so-called Republic of Texas. As a consequence, the OAG exchanged intelligence information with various law enforcement agencies. You have supplied letters from the various law enforcement agencies requesting that the submitted intelligence information be withheld as release could interfere with future law enforcement efforts and stating that the information had not been utilized in any investigation that resulted in conviction or deferred adjudication. Further, two law

Further, two law enforcement agencies advised the OAG that the requested information related to pending criminal investigations. Based on the representations of the various law enforcement agencies and the OAG and our review of the submitted information, we agree that you have demonstrated that release of most of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to incident). Exhibit 5, however, contains some information obtained from the internet for which it has not been demonstrated that release would interfere with law enforcement. We have marked the pages in Exhibit 5 that you must release. Therefore, we conclude that you may withhold Exhibits 1, 3, 4, and 6 as well as the remaining information in Exhibit 5 under section 552.108 of the Government Code.²

You claim that the documents in Exhibits 2, 8-14, and 17 are excepted under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications between the client and the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal a client confidence, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

As to Exhibits 2, 8-14, and 17, you assert that these documents contain client confidences and legal advice and recommendations of OAG attorneys. After reviewing the submitted information, we conclude that the documents in Exhibits 2, 8-11, 14, and 17 and most of the information in Exhibit 12 contain legal advice or reflect confidential communications that are protected by section 552.107(1). However, we find that you have not demonstrated that the document in Exhibit 13 contains legal advice or opinion or contains client confidences. *See also* Open Records Decision No. 574 (1990) (the factual recounting of events, including the documentation of calls made, meetings attended, and memos sent, are not excepted from disclosure by section 552.107(1)). Further, we conclude that you have failed to establish section 552.107(1) with regard to a document in Exhibit 12 that came from a third party. We have marked the document in Exhibit 12 that must be released. Therefore, we conclude that

²We will address Exhibit 2 under section 552.107(1) of the Government Code. Having found the information to be excepted under section 552.108, we need not address the applicability of your other asserted exceptions.

you may not withhold Exhibit 13 or the marked document in Exhibit 12 under section 552.107(1), but you may withhold the remaining information in Exhibit 12 as well as the entirety of Exhibits 2, 8-11, 14, and 17 under section 552.107(1) of the Government Code.³

You also claim that Exhibits 13, 15, 16, and 18-21 are attorney work product that is excepted under section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996) (citing *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)).

You inform this office that the OAG filed litigation against members of the so-called Republic of Texas. See *Cornyn et al. v. Van Kirk et al*, No. 96-03754 (98th Dist. Ct., Travis County, Tex. Jun. 1996). You explain that the submitted documents were created for trial or in the anticipation of trial. Therefore, we conclude that you have demonstrated that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank*.

Further, you contend that the documents reveal an attorney's mental processes, conclusions, and legal theories concerning the lawsuit. Further, you assert that Exhibit 18, a contact list, reveals case strategy decisions because it reveals an attorney's thoughts of who to include or exclude from the list. Based on your representations and our review of the submitted information, we agree that the documents in Exhibits 15, 16, 18, 19, and 20 and the redacted portions of Exhibit 21 may be withheld under the attorney work product privilege as incorporated into section 552.111 of the Government Code.⁴ However, we conclude that you have failed to demonstrate that the document in Exhibit 13 was created in anticipation of litigation or contains an attorney's mental processes, conclusions, or legal theories. Thus, you must release Exhibit 13.

³Having found the documents in Exhibits 8-11, 14, and 17 to be excepted under section 552.107(1), we need not address the applicability of section 552.111 with regard to these documents.

⁴Having found the documents in Exhibits 15, 16, 18, 19, 20, and 21 to be excepted under section 552.111, we need not address the applicability of section 552.107 with regard to these documents.

Next, you contend that some of the information in Exhibit 22 must be withheld under section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure information that relates to the home addresses, home telephone numbers, social security numbers, and family member information of former or current employees of a governmental body who request that this information remain confidential under section 552.024. You inform this office that the employees have elected confidentiality under section 552.024 for their home addresses, home telephone numbers, social security numbers, and family member information. Therefore, you must withhold this information under section 552.117(1) of the Government Code.

You also claim that some of the information in Exhibit 23 must be withheld under section 552.130 of the Government Code. Section 552.130(a) of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, you must withhold the marked driver's license number and license plate number in Exhibit 23 under section 552.130(a) of the Government Code. We have also marked a driver's license number Exhibit 28 which must be withheld under section 552.130 of the Government Code.

Further, you assert that information in Exhibit 24 is excepted under section 552.101 in conjunction with section 15.10(i) of the Business and Commerce Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including section 15.10(i) of the Business and Commerce Code. You state that the information in Exhibit 24 was produced in response to a Civil Investigative Demand ("CID") issued under section 15.10 of the Business and Commerce Code.⁵ Section 15.10(i) provides in part

(1) Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

Bus. & Com. Code § 15.10(i)(1). You state that none of the permissive exceptions are applicable. Therefore, we conclude that the OAG must withhold documents and information contained in Exhibit 24 under section 552.101 in conjunction with section 15.10(i)(1) of the Business and Commerce Code.

⁵You have provided a draft of a CID in Exhibit 25 for our reference.

Next, you assert that the documents in Exhibit 26 consist of criminal history record information ("CHRI") that is excepted under section 552.101 of the Government Code. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Therefore, you must withhold the CHRI in Exhibit 26 under section 552.101 of the Government Code.

You also contend that the documents in Exhibit 27 are excepted under section 552.101 in conjunction with section 159.002(b) of the Occupations Code, a provision of the Medical Practice Act ("MPA"). Section 159.002(b) provides the following:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c).

The billing records do not appear to have been created or maintained by a physician. Moreover, you do not state, and there is no indication on the documents themselves that any information in the billing records was obtained from medical records. Therefore, we find that the information at issue in Exhibit 27 is not subject to the MPA.

Next, you inform this office that you have released section I of a responsive custodial death report to the requestor but claim that sections II through V are confidential under section 552.101 in conjunction with article 49.18(b) of the Code of Criminal Procedure. You did not, however, submit the custodial death report within fifteen business days as required by section 552.301(e)(1)(D). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You claim that sections II through V are excepted under section 552.101 of the Government Code which provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Therefore, we will address your arguments.

In Open Records Decision No. 521 at 5 (1989), this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the OAG, section I of a custodial death report filed with this office is public information and must be released, but sections II through V of the report, as well as attachments to the report, are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). We conclude that, pursuant to article 49.18 of the Code of Criminal Procedure, the OAG must withhold sections II through V of the custodial death report. *See* Open Records Decision No. 521 (1989). Similarly, the documents compiled and attached to the custodial death report as attachments must be withheld. *Id.* at 7.

We understand you to request a previous determination with respect to custodial death reports requested from the OAG. We have determined that this letter ruling shall serve as a previous determination under section 552.301(a) that sections II through V of a custodial death report, as well as attachments, requested from the OAG are excepted from public disclosure under section 552.101 in conjunction with article 49.18(b) of the Code of Criminal Procedure as provided in Open Records Decision No. 521 (1989). Thus, the OAG is not required to request a decision from this office in order to withhold this information under section 552.101 of the Government Code. *See* Open Records Decision No. 673 at 7-8 (2001).

Further, you contend that the documents in Exhibit 28 are excepted under common law privacy. Section 552.101 of the Government Code also includes information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts

about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683; *see also* Open Records Decision No. 262 (1980) (information about drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, and emotional/mental distress excepted under common law privacy). Accordingly, we agree that you must withhold the marked portions of Exhibit 28 under section 552.101 in conjunction with common law privacy.

We note that the information in Exhibits 27 and 28 contains social security numbers. Social security numbers may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* However, it is not apparent to us that the social security numbers were obtained or maintained by the OAG pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the OAG to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution the OAG, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Gov't Code § 552.352. Prior to releasing the social security numbers, the OAG should ensure that these numbers were not obtained or maintained by the OAG pursuant to any provision of law enacted on or after October 1, 1990.

In conclusion, you may withhold Exhibits 1, 3, 4, 6 and most of Exhibit 5 under section 552.108 of the Government Code. You may also withhold Exhibits 2, 8-11, 14, 17, and part of Exhibit 12 under section 552.107(1) of the Government Code. Further, you may withhold Exhibits 15, 16, 18-20, and portions of Exhibit 21 under section 552.111 of the Government Code. You must also withhold information in Exhibit 22 under section 552.117(1) and information in Exhibits 23 and 28 under section 552.130 of the Government Code. The information in Exhibit 24 must be withheld under section 552.101 in conjunction with section 15.10(i) of the Business and Commerce Code and you must withhold CHRI in Exhibit 26 under section 552.101 of the Government Code.

You must also withhold sections II through V of the ~~custodial~~ death report under section 552.101 in conjunction with article 49.18(b) of the Code of Criminal Procedure. Further, the OAG may rely on this ruling as a previous determination and need not request a decision from this office again to withhold sections II through V of a custodial death report.

You must also withhold the marked information in Exhibit 28 under section 552.101 in conjunction with common law privacy. You must release the information in Exhibit 27 with the exception of any social security numbers that were obtained or are maintained by the OAG pursuant to any provision of law enacted on or after October 1, 1990. You must also release the marked portions of Exhibits 5 and 12 as well as the document in Exhibit 13.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

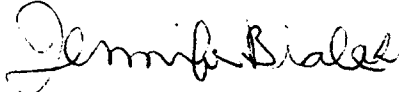
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Bialek".

Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 148708

Enc. Submitted documents

c: Mr. J. D. Arnold
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(w/o enclosures)